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NO. [redacted] 1144

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

WILLIAM L. HEAD AND
JESSE M. CUMMINGS ..... Petitioners

vs.

THE STATE OF MISSISSIPPI ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in the above entitled cause on January 22, 1962, and the action of said court overruling a suggestion of error entered on February 26, 1962.

CITATIONS TO OPINIONS BELOW

On January 22, 1962, the Supreme Court of Mississippi rendered an opinion in the above entitled cause, being No. 41,948 on the docket in the Supreme Court of Mississippi, affirming a conviction of petitioners in the Circuit Court of Forrest County, Mississippi, for the possession of burglary tools, a copy of which opinion is attached hereto as Appendix A.

On February 26, 1962, the Supreme Court of Mississippi rendered a further opinion in the above entitled case overruling a motion for suggestion of error, a copy of which opinion is attached as Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under the Fourth and Fourteenth Amendments to the Constitution of the United States.

The federal question sought to be reviewed was first raised when specific and continuing objections were made to the testimony of Sheriff Bob Waller in the Circuit Court of Forrest County, Mississippi, concerning objects obtained as a result of an unlawful search and seizure (R. 74), and again at the conclusion of the testimony of Sheriff Bob Waller when a motion was made to strike the sheriff's testimony and to declare all exhibits obtained in the unlawful search and seizure to be inadmissible (R. 115-116).

The federal question was again raised on appeal to the Supreme Court of Mississippi where the issue of the illegal and unlawful search and seizure of alleged burglary tools which petitioners were convicted of having in their possession was rejected. The Supreme Court of Mississippi, stated:

> "In order to avail of the constitutional provision of unlawful search and seizure, the sheriff must invade the premises or property of defendant and such defendant must at least have a right of possession that would make him owner for the time being."

And the Supreme Court of Mississippi concluded petitioners did not have such a "right of possession" even though they were convicted of possession of the tools found as a result of the unlawful search and seizure.

QUESTION PRESENTED.

The primary question presented is the validity of a search and seizure conducted by Sheriff Bob Waller of Forrest County, Mississippi, without warrant and not as an incident to a lawful arrest, the fruits of which, search and seizure became the sole basis for petitioners conviction.

STATEMENT OF CASE

Petitioners were passengers in a Chevrolet Impala automobile which was owned and being operated at the time by a third party, Berry Smith, Jr. It was about 8:30 p.m. on Monday, August 29, 1960, and the car was proceeding at a slow rate on the road to the airport near the City of Hattiesburg, Mississippi. (R. 63-64) Sheriff Bob Waller was approaching from the opposite direction at about ten or fifteen miles per hour in an unmarked 1950 Ford. There was nothing about the appearance of the sheriff or his automobile that would identify his official position. Sheriff Waller proceeded beyond the car in which petitioners were passengers, turned around and approached the Chevrolet Impala from the rear. As he approached, the Chevrolet Impala stopped by the side of the road and the driver motioned for the sheriff's car to pull up beside the Chevrolet Impala, which he did (R. 65). While the sheriff was in the process of rolling down his window, the Chevrolet Impala "really took off." (R. 66) In about ten to twelve seconds the Chevrolet Impala was exceeding the speed limit (R. 103), and Sheriff Waller was in pursuit and sounded his siren (R. 66). The sheriff's unmarked 1950 Ford had a Mercury engine, a four-barrel carburator, shaved head, and was very "hot." (R. 67) The flight and pursuit continued for several miles during which time the Chevrolet Impala ran two red lights, and Sheriff Waller radioed

ahead for the highway patrol to intercept the Chevrolet Impala. At times the sheriff and Highway Patrolman Puckett exceeded 100 miles per hour. (R. 67-70)

A short time later the Chevrolet Impala voluntarily came to a stop, and Sheriff Bob Waller pulled in front of the car and Highway Patrolman Puckett to the rear (R. 73). The highway patrolman arrested the driver, Berry Smith, Jr., for speeding (R. 128, 73). The sheriff arrested petitioners because they "were occupants of a car who had jeopardized lives from airport to Vance's Dairy." (R. 112) The car in which petitioners were riding was locked and left by the road while the driver, Berry Smith, Jr., and petitioners were taken to the county jail where they were searched and locked up.

Between 45 minutes and an hour later (R. 74) Sheriff Waller and Highway Patrolman Puckett returned to the automobile in which petitioners had been riding, searched same, and found in the trunk thereof the tools on which the present action for unlawful possession of burglary tools is predicated. The search was conducted without a warrant and without the consent of Berry Smith, Jr., or petitioners (R. 108). At the time of making this search, as well as when the chase commenced, Sheriff Waller had no information concerning the possibility of the Chevrolet Impala being used to haul whiskey (R. 107), the petitioners were not committing a crime in the sheriff's presence, and at no time did he see or suspect petitioners of having committed a crime or being wanted in connection with the commission of a crime. (R. 108) The only offense which occurred at any time insofar as the sheriff's authority to arrest and search is concerned, happened about ten or twelve seconds after the Chevrolet Impala "really took off" (R. 66) from a stopped position. This offense consisted of operating a vehicle at an exces-

sive and unlawful rate of speed and did not involve or concern petitioners.

After the unlawful arrest of petitioners and an even later search of the Chevrolet Impala in which petitioners had been passengers, the petitioners and the owner and operator of the vehicle, Berry Smith, Jr., were jointly charged with the wrongful possession of certain tools found in the trunk of the car which are alleged to be burglary tools. Following an indictment on November 14, 1960, by the grand jurors of Forrest County, Mississippi of Berry Smith, Jr., Jesse M. Cummings and William L. Head for "unlawfully, knowingly, and feloniously" having in "their possession certain tools . . . designed to aid in the commission of burglary" (R. 2), a severance was obtained and Berry Smith, Jr., was tried separately (R. 59-62).

Over petitioners' objection, the state permitted Sheriff Bob Waller to identify and received in evidence the following articles set forth in the indictment:

Exhibit No.	*Article*	*Place Found*	*Record*
2	1 metal tool with grabbing tongs	trunk of car	R. 77-78
3	1 little drill and bit	trunk of car	R. 78
5	1 pair of leather gloves	trunk of car	R. 80-81
6	1 pair of cotton gloves	under dashboard of car	R. 81
7	1 power saw with hacksaw blade	trunk of car	R. 82-
8	1 manual hacksaw	trunk of car	R. 83-84
10	1 pair of pliers	trunk of car	R. 85-87
14	1 gas mask	trunk of car	R. 93

In addition to the foregoing articles alleged to be burglary tools and found, except for the cotton gloves, in the trunk of the car, there was also introduced the following items:

Exhibit No.	*Article*	*Place Found*	*Record*
1	.45 Revolver and six cartridges	under front seat of car	R. 74-77
4	1 pair of cotton gloves	found on side of Highway 49	R. 78-80
9	Assorted number of money wrappers	somewhere in car	R. 84
11	Man's sock with undisclosed number of coins in it	in one of three suitcases found in trunk of car	R. 87-88
12	1 man's cap	found by roadside	R. 88-89
13	1 shoulder holster	somewhere in car	R. 89-90
17	one .38 pistol with six cartridges	found by highway several days later by college student	R. 91-92, 132-136

Highway Patrolman J. C. Puckett collaborated the sheriff's testimony with reference to the chase subsequent to when he joined the chase as a result of a radio call, and with respect to the search of the Chevrolet Impala sometime after the arrest (R. 117-127). The highway patrolman actually arrested Berry Smith, Jr., the driver of the Chevrolet Impala, and the sheriff arrested the petitioners (R. 127-128).

An eighteen year old college student, Jimmy Wiltshire, testified that he found a .38 pistol by the side of Highway

45 while hitch-hiking to Jackson (R. 131). He delivered the .38 pistol to an attorney friend, George Gulley, Jr., in Brookhaven, Mississippi (R. 134). The pistol offered in evidence (Exhibit No. 17) looks like the one he found (R. 134-135) but he would not swear it was the same one (R. 137-138).

A former member of the Hattiesburg Police Department, Hugh Herring, who has 23 years experience and who is presently deputy fire marshall for the State of Mississippi, testified over vigorous objection (R. 141-143) that there were safes in Forrest County which were equipped with tear and sickening gas that would be released in case anyone attempted to crack the safe. He also testified the .38 calibre pistol, Exhibit 13, which was found by the road side, fit the shoulder holster which was found somewhere in the car (R. 146, 89-92). On cross-examination, Mr. Herring admitted the tools presented as exhibits were not adequate for cracking a safe by any of the known methods since no chisel and hammer were present, the bit did not fit the drill, and there was no other tool by which initial entry into a safe could be accomplished (R. 151-162). He expressed the opinion the tools could be used to assist other acts of burglary.

After the state rested, the defense moved to exclude those exhibits which were found on the highway, being cotton gloves, a cap and the .38 calibre pistol. The motion was sustained as to the cotton gloves and cap, but overruled as to the pistol (R. 182).

The defense made a motion for a pre-emptory instruction to the jury which was overruled (R. 183). The defense presented no evidence.

REASONS FOR GRANTING THE WRIT

Unless this writ is granted the rights of these petitioners under the Fourth and Fourteenth Amendments to the Constitution of the United States as recently determined by this honorable court in *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, rehearing denied, 82 S. Ct. 23; *Jones v. United States,* 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, 78 ALR 2d 233; *Rios v. United States,* 364 U. S. 253, 80 S. Ct. 413, 4 L. Ed. 2d 1688; and *Elkins v. United States,* 364 U. S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669, will be violated an denied.

The violations of petitioners' constitutional rights have resulted from an invalid arrest followed later by an unlawful search and seizure by a state officer, County Sheriff Bob Waller. The evidence obtained as a result of this search resulted in a joint indictment against petitioners and the owner and operator of the automobile in which they were passengers, Berry Smith, Jr., for "unlawfully, knowingly and feloniously" having in "their possession certain tools . . . designed to aid in the commission of burglary." (R. 2)

Berry Smith, Jr., owner and operator of the automobile, was tried separately, and the Supreme Court of Mississippi recognized the invalidity of the search and seizure as to Berry Smith, Jr., reversed and dismissed his conviction in *Smith v. State,* 240 Miss. 738, 128 So. 2d 857. In the *Smith* case, the court stated:

> "The question to be determined in this case is: Was the search of defendant's automobile a lawful search? . . . What right, if any, did the officer have to search the possessions of the defendant? . . .
>
> • • •

> The evidence in this case discloses that the officer had no reason to believe that the person driving the Chevrolet Impala had committed a felony when he drove up beside the defendant, therefore, the sheriff had no duty to make an arrest of the defendant unless it was sufficiently evident to the sheriff at this time that the driver of the Chevrolet was committing a crime in his presence, or there was some 'breach of the peace, threatened or attempted in his presence.' . . . This court has held, however, that the search begins when the pursuit begins . . . And an arrest begins when an officer begins his pursuit for the purpose of making an arrest. If an officer does not have the authority to make an arrest at the instant he begins his pursuit for the purpose of making the arrest, the fact that the person the officer is pursuing volates the traffic law in making his escape does not thereby authorize the arrest that began unlawfully, because an officer who attempts an unlawful arrest cannot later arrest a citizen for resisting such trespass . . .
>
> • • •
>
> In the case at bar, there was no evidence that the defendant was committing a crime or was attempting to breach the peace, when the sheriff began his pursuit. The sheriff had no duty nor right to arrest the defendant at that time; therefore, the search made of the defendant's automobile was an incident to an illegal arrest, and was an unlawful search."

A *fortiori*, if the driver (Berry Smith, Jr.) had not committed an offense which would render the subsequent search and seizure illegal, the petitioners, who were innocent passengers, had not committed an offense which would sustain the search and seizure as to them. However, on appeal of petitioners' conviction to the Supreme

Court of Mississippi, the court affirmed their conviction on January 22, 1962, *Head v. State,* 136 So. 2d 619, and stated:

> "In order to avail of the constitutional provision of unlawful search and seizure, the sheriff must invade the premises or property of defendant and such defendant must at least have a right of possession that would make him owner for the time being.
>
> * * *
>
> Since the defendants were not in possession of the automobile, either in the control or ownership of the car, they have no right to raise the constitutional question of search. . . ."

While denying these petitioners had a right of possession that would make them owner for the time being of the tools found in the trunk of the automobile in which petitioners were riding as passengers insofar as the question of unlawful search and seizure was concerned, the court in the same breath permitted the state to use this evidence in convicting petitioners of "unlawfully, knowingly, and feloniously" having in their "possession certain tools . . . designed to aid in the commission of burglary." (R. 2) In so holding, the Supreme Court of the State of Mississippi is in direct conflict with the holding of this court in *Jones v. United States,* supra. In the Jones case, it was stated:

> ". . . Two separate lines of thought effectively sustain defendant's standing in this case. (1) The same element in this prosecution which has caused a dilemma, i. e. that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged. (2) Even were this not a prosecution turn-

ing on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below.

As to the first ground, we are persuaded by this consideration: to hold to the contrary, that is, to hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the government to have the advantage of contradictory positions as a basis for conviction. Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the government. The possession on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41 (e)."

The case at bar is analogous to *Contreras v. United States*, 291 Fed. 2d 63 (1961), in which there was even stronger justification for searching the automobile, but the court applied the rule announced in *Jones v. United States*, supra. In the *Contreras* case the highway inspector of the Immigration and Naturalization Service stopped an automobile on a highway in California about 72 miles north of the Mexican border to perform a routine

check for "illegal aliens." They questioned the occupants of the automobile and became suspicious of one of the passengers in the back seat. When he asked a passenger in the front seat to step out so he could converse with him, the inspector noticed for the first time a paper sack covered by a leather jacket and a bedspread which he learned on examination contained Marijuana. In reversing the conviction and remanding the case with instructions to dismiss the indictment as to each of the occupants of the car, the court stated:

"The case thus presents only two questions:

1. Did the appellants have standing to move for the suppression of evidence and to object to the introduction of the evidence?

2. Was the evidence obtained by an illegal search?

When the trial court denied the motion to suppress, the case of Jones v. United States, 1960, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, *had not yet been decided*. In the light of that case, this court must reject the trial court's ruling that appellants had no standing to raise the search and seizure question. Where a criminal charge against a defendant is based upon possession, the Jones case establishes that the defendant is, by the very fact, a 'person aggrieved by an unlawful search and seizure,' . . . and may, therefore, raise the constitutional question. The Supreme Court in the Jones case stated further that the government should not be allowed to deprive a 'defendant of standing to bring a motion to suppress by framing the indictment in general terms while, prosecuting for possession.' . . .

* * *

The search involved here was made without a warrant; and it was not made in connection with a lawful arrest,

since the arrest admittedly was made after the search and seizure took place. . . ."

It would appear the state officers in searching, and the Supreme Court of the State of Mississippi in approving petitioners' conviction, were acting under a mistaken assumption rejected in *United States v. De Ri*, 332 U. S. 581, 68 S. Ct. 282, 92 L. Ed. 210, in which the court stated:

"The belief that an automobile is more vulnerable to search without warrant than is other property has its source in the decision of Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 ALR 790. That search was made and its validity was upheld under the search and seizure provisions enacted for the enforcement of the National Prohibition Act and of that Act alone.

• • •

We see no grounds for expanding the ruling in the Carroll case to justify this arrest and search as incident to the search of a car. We are not convinced that a person by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."

CONCLUSION

Petitioners' constitutional rights have been violated in that (1) they were unlawfully arrested by a state officer; (2) an illegal search and seizure was made of the automobile in which they were passengers; and (3) they were convicted of unlawfully, knowingly and feloniously having in their possession the fruits of the unlawful search and seizure.

Petitioners were passengers in a Chevrolet Impala which was being operated by Berry Smith, Jr., who was jointly indicted with petitioners for unlawful possession

of alleged burglary tools found in the trunk of the Chevrolet about an hour after Berry Smith, Jr., and petitioners had been arrested, the automobile locked and left on the highway while they were taken to a county jail. No crime had been committed in the state officer's presence at the time he arrested petitioners, and the car in which petitioners were riding was not known or suspected of hauling contraband. A severance was had as to Berry Smith, Jr., who was convicted of the unlawful possession of the alleged burglary tools found in the trunk of his automobile. The Supreme Court of the State of Mississippi reversed the conviction and dismissed the indictment because "the search made of defendant's (Berry Smith, Jr.) automobile was an incident to an illegal arrest, and was an unlawful search."

Contrary to the opinion of the Supreme Court of Mississippi, see Appendix A and B, petitioners have "standing" as persons aggrieved by an unlawful search and seizure by virtue of their conviction for the wrongful possession of the fruits of the unlawful search and seizure. *Jones v. United States*, supra. The arrest as well as the subsequent search and seizure of articles which formed the basis of petitioner's conviction were invalid and the subsequent conviction should be reversed and the indictment dismissed. *Smith v. State*, supra; *Rio v. United States*, supra; and *Contreras v. United States*, supra.

APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. 41,948

WILLIAM L. HEAD AND JESSE M. CUMMINGS,

vs.

STATE OF MISSISSIPPI

McELROY, JUSTICE:

Appellants were jointly indicted with Berry Smith, Jr., for possession of burglary tools in Forrest County, Mississippi. After severance granted Smith was separately tried, convicted and sentenced to the penitentiary. Smith appealed his conviction and in Smith v. State, 128 So. 2d 857, his conviction was reversed and he was discharged on the question of illegal search under the Constitution since he was in control and possession of the car. The appellants, Head and Cummings, were passengers in the car, one on the front seat and the other on the rear seat. These appellants were then tried together, convicted and sentenced to serve a term of five years in the State penitentiary, from which conviction and judgment this appeal is taken.

The facts in this case are identical with those in Smith v. State, supra, except those facts apply to the driver of the car and the person in possession of the car. Therefore, the defendants herein, as passengers in the car, are in a different situation than the appellant, Smith, in the former trial.

About 8:30 or 9 o'clock at night, near the airport gate southeast of the City of Hattiesburg, Forrest County, Mississippi, the sheriff, Bob Waller, was patroling in an unmarked car about ten or fifteen miles per hour when he met a Chevrolet Impala automobile traveling at a very slow rate of speed in the opposite direction. The Sheriff passed the Chevrolet, turned around and came up behind it. The driver of the Chevrolet, Smith, motion the Sheriff to come up beside his car. The Sheriff pulled up beside the stopped Chevrolet and rolled his window down. When the driver of the Chevrolet saw that it was the Sheriff, he drove away rapidly. As the Sheriff described it in the case at bar, the car occupied by appellants "scratched out" and "took off in a cloud of smoke." The Sheriff sounded his siren and immediately pursued the Chevrolet. Within ten seconds the Chevrolet was exceeding the speed limit.

The record in this case discloses that during this chase up Highway 49 by-pass, several articles were thrown out of the window on the right-hand side of the Chevrolet. These articles were thrown out by the defendants, the passengers in the car. One of these appellants was sitting in the front seat on the right-hand side, and the other appellant was sitting in the rear. Searches along the road shoulder resulted in the finding of gloves, a cap, a pistol and a shoulder holster in which the pistol was a perfect fit, other gloves, a .45 calibre revolver, an assortment of tools established to be burglary tools, and other tools. Among the items found was a gas mask, and it was shown by the testimony of the sheriff that in the Hattiesburg vicinity there were several safes equipped to eject a disabling gas when opened. Additional things were found in the trunk of the car, including clothes, money wrappers, money in some of the socks, and many

other articles which the jury was fully justified in finding that same were used as burglary tools.

The appellants rely on Smith v. State, supra, a companion suit to this case. The law of that case is not applicable here. Berry Smith, Jr., was the driver of the car, and this Court took into consideration in that case that Smith was the owner and in the rightful possession of the car and had a perfect right to object to the unlawful search. Neither of the present appellants can make the same objection. One of these appellants was in the front seat on the right side and the other was in the back seat. They were both seen throwing the articles out of the car, and later when the sheriff went back to the car he found further articles on the right side of the front seat and on the back seat.

In order to avail of the constitutional provision of unlawful search and seizure, the sheriff must invade the premises or property of defendant, and such defendant must at least have a right of possession that would make him owner for the time being.

In Rose v. State, 76 So. 2d 835, (Miss.), the Court said:

"On the night after the robbery officers stopped an automobile which was being driven by Ballow, and in which Wood, Scott and Rose were also riding. In the car the officers found pistols and a rope which the evidence shows were used in the robbery. Proof was made of that on the trial of this appellant. Rose says it was error to make that proof because the officer had no warrant to search the car. The contention is not well taken. In addition to the fact that the automobile was exceeding the speed limit, in the presence of the officers, it is shown that Rose did not own, or claim to own, the automobile, nor did he claim to be in possession thereof,

rightfully or otherwise. The car was being driven by Ballow, and Rose was on the back seat. It was licensed in the name of a Mrs. Stevens. To be in position to complain of an illegal search, one must either be the owner or in the rightful possession of the property searched. Lee v. City of Oxford, 134 Miss. 647, 99 So. 509; Lucas v. City of Oxford, 134 Miss. 647, 99 So. 509; Lucas v. City of Oxford, 134 Miss. 771, 99 So. 510; Ross v. State, 140 Miss. 367, 105 So. 846; Polk v. State, 167 Miss. 506, 142 So. 480; McLemore v. State, 178 Miss. 525, 172 So. 139; Brown v. State, 192 Miss. 314, 5 So. 2d 426; Smith v. State, 198 Miss. 788, 24 So. 2d 85; Harris v. State, 216 Miss. 895, 63 So. 2d 396; Brooks v. State, Miss., 52 So. 2d 609. The Brooks case involved property taken from an automobile not owned or in the rightful possession of the accused."

Since the defendants were not in possession of the automobile, either in the control or ownership of the car, they have no right to raise the constitutional question of search.

The appellants objected to the instruction No. 1 as follows:

"The Court instructs the Jury for the State that under the law of this State the carrying concealed about one's person or in one's baggage implements, tools or instruments peculiarly adapted to aid in the commission of burglary shall be prima facie evidence of intention to use them for such purpose. Therefore, if you believe from the evidence in this case beyond a reasonable doubt that the defendants carried concealed about their persons, or in their baggage, implements, tools, or instruments peculiarly adapted to aid in the commission of burglary, then you are instructed that this is prima facie evidence of intention to use them for such purposes."

We find no error in this instruction. Practically every judicial definition of the word "baggage" is not merely the suitcase or other container commonly used by travelers in carrying their property, but the word refers to the property itself. The term "baggage" has been held to include tools used in a trade and usually carried about by the owner from place to place in his trunk; razors and other tools of a barber; carpenter tools carried in a trunk with the owner's clothing. One case held the term was to include "a rifle, revolver, two gold chains, two gold rings, a silver pencil case" belonging to a traveler for pleasure and amusement. For scores of judicial definitions of this term, see page 19 of Words and Phrases, Perm. Ed., Vol. 5.

We find no error in the trial of the case, therefore, the case is affirmed.

AFFIRMED.

LEE, P. J., AND ARRINGTON, RODGERS AND JONES, JJ., CONCUR.

Monday, January 22, 1962, Court Sitting:::::

William L. Head and Jesse M. Cummings,
41,948 vs.
State.

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Forrest County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the January 1961 Term—a conviction of the unlawful possession of burglary tools and a sentence to 5 years each in the State Penitentiary—be and the same is hereby affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellants and United Bonding Insurance Company, surety on the appeal bonds herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Monday, February 26th, 1962. Court Sitting:::::::

William L. Head and Jesse M. Cummings,
41,948 vs.
State.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

STATE OF MISSISSIPPI
HINDS COUNTY

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the above and foregoing is a true and correct copy of the opinion delivered by the Court, a true and correct copy of the judgment rendered by the Court and a true and correct copy of the order overruling Suggestion of Error, in Cause No. 41,948 styled—William L. Head and Jesse M. Cummings vs State of Mississippi as the same appears of record on file in my office.

Given under my hand, with the seal of said Court affixed, at office, in the City of Jackson, Miss., this the 18th day of April, A. D. 1962.

TOM Q. ELLIS
Clerk of Supreme Court

BY JULIA KENDRICK, D.C.

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No. 144

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

WILLIAM L. HEAD and
JESSE M. CUMMINGS ..... Petitioners

vs.

THE STATE OF MISSISSIPPI ..... Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 144

WILLIAM L. HEAD and
JESSE M. CUMMINGS — Petitioners

vs.

THE STATE OF MISSISSIPPI — Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioners were convicted in the Circuit Court of Forrest County, Mississippi for the unlawful possession of burglary tools. Their conviction was affirmed by the Supreme Court of Mississippi. A copy of the Mississippi Supreme Court's opinion is made a part of the petition herein. Petitioners' case was a companion to Smith vs. State, 128 So. 2d 857. Under circumstances described in the petition herein and much more particularly in the trial transcript and opinions in both cases, after a wild chase through dense traffic at dangerous rates of speed, the car operated by Smith, and in which petitioners were passengers, was stopped by the Forrest County Sheriff and a member of the Mississippi Highway Patrol, whose aid had been requested by the Sheriff. The conviction of Smith was reversed and he was discharged by the Mississippi Supreme Court by a 6-3 majority which

held that the Sheriff had no legal right to initiate the chase of the Smith car under the particular circumstances and that, consequently, the fruits of the subsequent search of the car could not be constitutionally used against Smith. This decision was predicated, not upon Federal Constitutional grounds, but as a violation of Section 23, Mississippi Constitution, 1890, which guarantees that "The people shall be secure in their persons, houses, and possessions, from unreasonable * * * search; * * *."

It has long been the rule in Mississippi that only the owner or one in rightful possession of property (including automobiles) could invoke the Constitutional safeguard and it was that rule as had been announced in, among other cases, Rose vs. State, (Miss.) 76 So. 2d 835, upon which the Mississippi Supreme Court affirmed the separate conviction of petitioners.

Petitioners herein rely primarily for relief on Jones vs. U. S., 362 U.S. 257, 80 Sp. Ct. 725, 4 L. Ed. 2d 697, 78 A.L.R. 2d 233, and similar cases in support of the rule announced therein, as well as Mapp vs. Ohio, 367 U.S. 643, 81 Sp. Ct. 1684, 6 L. Ed. 2d 1081, rehearing den., 82 Sp. Ct. 23. Mississippi has no argument with Mapp vs. Ohio since for many years Mississippi has vigorously adhered to the exclusionary rule of evidence under its own Constitution.

Nor does the State of Mississippi take issue with the soundness of Jones vs. U. S. Had the Mississippi Supreme Court ever had the argument made to it that was made to this Court in Jones vs. U. S., no doubt it would have long since adopted the same rule. It goes without saying that in cases involving unlawful possession of various types of contraband, a person cannot very well be in actual or constructive possession of something in

the trunk of a car without having such a possessory interest in that car as to be protected by both the Mississippi and United States Constitutions. However, no such argument was made in the case at bar to the Mississippi Court but only objections general in their nature were made without reference in the trial Court to either the State or United States Constitutions.

Without regard to the Constitutional questions raised, it also goes without saying that, a fortiori, if petitioners had their possessory interest protected by the Constitutions, the trial Court reached the right result in finding them equally guilty with Smith of the unlawful possession of the burglary tools.

Petitioners argue that their Constitutional rights have been violated in that (1) they were unlawfully arrested by a State officer; (2) an illegal search and seizure was made of the automobile in which they were passengers; and (3) they were convicted of unlawfully, knowingly and feloniously having in their possession the fruits of the unlawful search and seizure.

It is respectfully submitted that the points are not well taken for two reasons: First, the Constitution of the United States was not invoked either in the trial Court or in the State Supreme Court and; Second, the question of the legality of the arrest of petitioners, while raised in the State Court, was not decided or discussed by the State Supreme Court.

As an aid to the Court in consideration of these matters, there are appendicized hereto the Assignment of Errors, Brief of Appellants, Brief of Appellee and Suggestion of Error filed in the Mississippi Supreme Court and upon which the opinion of that Court was predicated. Nowhere in these pleadings and arguments will this Court

find that the Constitution of the United States was invoked. Only the Constitution of the State of Mississippi was invoked by reference in appellants' brief to Smith vs. State (appellants' brief - Page 4). Nor was the United States Constitution invoked on suggestion of error after affirmance in the State Court. This Court should be interested to know that Earle Wingo, who represented both Smith and petitioners in their trials and appeals, certainly knew what he was doing and how he wished to handle the appeals. Until his death a short while ago Mr. Wingo was considered the outstanding criminal lawyer in Mississippi, a former President of the Mississippi State Bar Association and author of "Mississippi Criminal Law and Procedure" (1951). After appealing petitioners' conviction Mr. Wingo became ill and, upon affirmance, the suggestion of error was prepared and presented to the Supreme Court of Mississippi by Mr. Lawrence Arrington, a former District Attorney and also considered one of the ablest criminal lawyers in the State. Thus, this Court should readily accept the proposition that the failure to specifically invoke the pertinent provisions of the United States Constitution was consciously done and not the result of ineptness or inexperience of counsel.

NO PROVISION OF UNITED STATES CONSTITUTION INVOKED IN STATE COURTS

In Levy vs. Superior Court (1897), 167 U.S. 175, 42 L. Ed. 126, 17 Sp. Ct. 769, this Court held that where a State statute was attacked in the State Court only on the ground of its repugnancy to the Constitution of the State and it was not claimed there that it was repugnant to the Constitution of the United States, this Court was without jurisdiction to review.

Bearing in mind that there was only one general reference to constitutionality in the case at bar either at the trial or in the State Supreme Court and this reference could only have been to the Constitution of Mississippi since the only authority cited, Smith vs. State, was decided under the State Constitution, the Constitution of the United States was not invoked. Porter vs. Foley, 24 How. 415, 16 L. Ed. 740. See, also, Miller vs. Cornwall R.R. Co., 18 Sp. Ct. 34, 168 U.S. 131, 42 L. Ed. 409.

"Something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the State Courts to give us the limited authority to review their judgments which exists under the Constitution and is regulated by . . . (28 USCA, Section 1257). A mere claim in the Court below that there has been a denial of due process of law does not of itself raise a Federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution." Thomas vs. Iowa, 28 Sp. Ct. 487, 209 U.S. 258, 52 L. Ed. 782.

The clause in the Constitution or the law of Congress under which the right, title, etc., is claimed, must be specified by the petitioners, and it is not enough to show that a Federal question might have arisen in and been applicable to the case. In that class of cases of which this is one, wherein a right, title, privilege, or immunity is claimed under the United States, it is required that such right or privilege be "specially set up and claimed." Harding vs. Illinois, 196 U.S. 78, 49 L. Ed. 394, 25 Sp. Ct. 176. Other cases supporting this situation are legion. Annotation 84 L. Ed. 925, et seq. Annotation Note 223, 28 USCA, Section 1257.

The United States Constitution not having been invoked until the filing of this petition for certiorari, it is too late. Spies vs. Illinois, 8 Sp. Ct. 21, 123 U.S. 131, 31 L. Ed. 80; Worthy vs. Moore County, 9 Wall. 611, 19 L. Ed. 565, and a multitude of other similar authorities under Note 219 to 28 USCA, Section 1257.

THE STATE SUPREME COURT HAD AN ALTERNATE GROUND OF AFFIRMANCE

For the sake of brevity, the argument of the State of Mississippi in connection with the arrest of petitioners (Appendix - Brief of Appellee, pgs. 4 & 5) is not reiterated. On appeal in State Court one issue was the legality of the arrest of petitioners. It is regrettable that the Mississippi Supreme Court pretermitted the question of the legality of the arrest of petitioners. It was content to rest its affirmance on the ground hereinabove discussed. Nevertheless, if the arrest of petitioners was legal and on a ground other than that for which Berry Smith, Jr. was arrested then, the officers had a right to search the car as an incident to the arrest of petitioners. In the absence of an applicable Federal statute (there is none here) the law of Mississippi determines the validity of an arrest therein. United States vs. Di Re, 332 U.S. 581, 92 L. Ed. 210. Therefore, since the Supreme Court of Mississippi, in the absence of an argument predicated on Jones vs. United States, could have predicated its affirmance on the legality of the arrest of petitioners, the United States Supreme Court is without jurisdiction to review its judgment. Ellis vs. Dixon, 349 U.S. 458, 75 Sp. Ct. 850, 99 L. Ed. 1231; Stembridge vs. Georgia, 343 U.S. 541, 72 Sp. Ct. 834, 96 L. Ed. 1130; Durley vs. Mayo, 351 U.S. 277, 76 Sp. Ct. 806, 100 L. Ed. 1178; Buck vs. California, 343 U.S. 99, 72 Sp. Ct. 502, 96 L. Ed. 775.

CONCLUSION

Wherefore, it is respectfully submitted that this case should not be reviewed by this Court for the reason that, first, the Federal Constitutional ground relied on was not raised in either the trial Court or the State Supreme Court and, second, the State Supreme Court could just as well have predicated its affirmance on the legality of the arrest of petitioners.

Respectfully submitted,

STATE OF MISSISSIPPI
BY JOE T. PATTERSON, Attorney General

By G. Garland Lyell Jr.

G. Garland Lyell, Jr.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General of the State of Mississippi, hereby certify that on the 21st day of November, 1962, I served one copy of the foregoing brief on the Attorney for petitioners herein, Honorable Douglas C. Stone, Post Office Box 166, Columbus, Mississippi, by depositing same in a duly addressed envelope with postage prepaid in the mail box in the Capitol Building in the City of Jackson, Mississippi.

G. Garland Lyell Jr.
Assistant Attorney General.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DECEMBER TERM, 1961

No. 41,948

WILLIAM L. HEAD and
J. M. CUMMINGS ..... Appellants

vs.

STATE OF MISSISSIPPI ..... Appellee

ASSIGNMENT OF ERRORS

Now come the appellants, William L. Head and J. M. Cummings, and respectfully assign the following errors committed upon the trial of the above styled and numbered cause, and assign the following:

1. The court erred in granting to the State Instruction No. 1, found in the record at page 24.

2. The court erred in overruling the objection of the appellants to the testimony of Sheriff Waller, on direct examination, with reference to the search of the vehicle, after having placed the appellants in jail and returning to the vehicle to search it. (R. p. 74)

3. The court erred in declining to sustain the objection of the appellants to the testimony of the sheriff with reference to items taken from the automobile, in which the appellants were passengers. (R. p. 76)

4. The court committed error in overruling the objection of the appellants to the testimony shown in the record at pages 79 and 80.

4. The court further committed error in overruling the objection of the appellants to the testimony of the sheriff on direct examination with reference to objects found along the highway, because they could not be identified as having been objects thrown from the car. (R. p. 89)

5. The court committed error in permitting the sheriff to testify on direct examination that there were safes in Forrest County equipped with gas, over the objection of the appellants. (R. p. 99)

6. The testimony of the sheriff, on cross-examination, reveals that the arrest of the appellants was without authority of law, because the sheriff testified that at the time he began to pursue the vehicle none of the parties in the vehicle were committing a crime in his presence. (R. p. 107)

7. The court committed error in overruling the motion of the appellants to exclude the testimony of the sheriff, who testified that he arrested the two appellants after the vehicle had stopped and placed them in a common jail, and about 45 minutes later went to the car and searched the same and obtained the articles testified to, and the record shows that the appellants had committed no crime whatever but were merely occupants of the car of Mr. Berry.

8. The court committed error in not permitting the Highway Patrolman Puckett, on cross-examination, to state why the appellants were being arrested.

9. The court committed serious error in overruling the motion of the appellants to exclude the items found on the highway, because they had not been identified as

having come from the vehicle in which the appellants were occupants. (R. p. 131)

Respectfully submitted,
/s/ Earle L. Wingo
Attorney for Appellants

CERTIFICATE

I, Earle L. Wingo, hereby certify that I have this date mailed, postage prepaid, the original of the above assignment of errors to Honorable Tom Q. Ellis, Clerk of the Supreme Court, of the State of Mississippi, at his office in Jackson, Mississippi; and that I mailed a correct copy of the above assignment of errors to Honorable Joe Patterson, Attorney General, of the State of Mississippi, at his office in Jackson, Mississippi.

Witness my signature this the 16 day of November, A.D., 1961.

/s/ Earle L. Wingo
Attorney

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DECEMBER TERM, 1961

No. 41,948

WILLIAM L. HEAD and
J. M. CUMMINGS — Appellants

vs.

STATE OF MISSISSIPPI — Appellee

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

The appellants, William L. Head and Jesse M. Cummings, when indicted in the Circuit Court of Forrest County, Mississippi for the possession of burglary tools, were tried jointly, convicted and sentenced to serve a term of five years in the State Penitentiary.

STATEMENT OF FACTS

At the outset we remind this Honorable Court that the appellants were in the company of one Berry Smith, Jr., who was convicted in the Circuit Court of Forrest County, Mississippi for the possession of burglary tools and sentenced to serve five years in the penitentiary, and on appeal the case was reversed and the appellant discharged. This case is reported in 128 So. (2d) 857, and being Supreme Court Case No. 41,889.

The appellants were passengers in an automobile operated by one Berry Smith, Jr., and on the night of August 29, 1960, the Sheriff of Forrest County, Bob Waller, testi-

fied that he saw Berry Smith, Jr. near the airport in Forrest County driving his automobile about 10 miles per hour, and that he turned around back toward the car of the appellant and that the driver, Berry Smith, Jr., motioned for him to come up to the side of the car, which he did, and that the sheriff leaned over to tell Berry Smith to pull over to check his driver's license but the appellant took off in a cloud of black smoke, and that he immediately began to pursue the automobile. (R. p. 49) That they did not violate the speed law until about ten seconds later, when the sheriff was already in pursuit of the vehicle. (R. p. 103)

The sheriff was in his private automobile, with no symbol of any kind to indicate that he was an officer of the law. (R. p. 102)

After the driver of the car was finally stopped by the sheriff and a highway patrolman, the sheriff arrested not only the driver of the car but the two appellants, Head and Cummings, and took all three parties to the jail in Forrest County, and sometime later went back out to the automobile and searched the same and found, what they claimed to be burglary tools.

The alleged burglary tools were found in the back-end of the automobile near the spare tire, and there was also located three suit-cases, and all of the alleged burglary tools were in the back-end of the car and had no connection with the suit-cases.

ARGUMENT

The first assignment of error relates to the granting of Instruction No. 1 to the State, found in the record at page 24. The serious objection to this instruction is that the jury was told that if they believed from the evidence

in this case beyond a reasonable doubt that the appellants carried concealed about their *persons*, or in their *baggage*, implements, tools, or instruments, peculiarly adapted to aid in the commission of burglary, then you are instructed that this is prima facie evidence of intention to use them for such purposes.

The proof clearly shows that there were no burglary tools, or instruments, peculiarly adapted to aid in the commission of burglary, carried concealed about their persons of these appellants or in their baggage.

Section 2044 of the Mississippi Code of 1942, as amended, does provide that:

"The carrying concealed about one's person, or anyone's baggage, implements, tools, or instruments, peculiarly adapted to aid the commission of burglary, larceny, or robbery, shall be prima facie evidence of intention to use them for such purpose."

It was prejudicial error for the court to permit the State to obtain a prima facie instruction in face of the absence of testimony supporting the wording of the statute, and that is that they had no burglary tools, or instruments, peculiarly adapted to aid the commission of burglary, larceny, or robbery, concealed about their person nor in their baggage. The proof clearly shows that this just was not true.

We submit to the court that, with reference to the second assignment of error, the sheriff had no right to arrest the appellants because up to that time they had violated no law in the presence of the sheriff, and they should not have been taken to jail, and, therefore, their arrest was without authority of law and wholly illegal, and any articles taken from the car in which they were a

passenger, would be inadmissible because of said illegal arrest.

At page 73 of the record, we find the testimony of Bob Waller on direct examination, who said he put these two appellants under arrest and brought them to the Forrest County jail, after having locked Berry Smith's car and leaving it near the highway, and then went back and unlocked the car and searched it without a search warrant.

We next complain of the court's error in declining to sustain the objection of the appellants to the testimony of the sheriff with reference to the items taken from the automobile, in which the appellants were passengers, for the reason it was an unlawful arrest and unlawful pursuit, and everything done by the sheriff and highway patrolman were illegal and unlawful in violation of the Constitutional rights of these appellants. *Berry Smith, Jr. v. State of Miss.*, 128 So. (2d) 857.

Next, error committed by the court was in overruling the objection of the appellants to the testimony of the sheriff on direct examination, at pages 79 and 80, wherein it was sought to introduce a pair of gloves found on the highway, because the sheriff nor anyone else could identify them as the objects that came from the car. This was highly prejudicial.

We next complain of the court in overruling the objection of the appellants to the testimony of the sheriff on direct examination with reference to a man's cap that was found on the highway, because it could not be shown that the cap came from the car. (R. pp. 88, 89)

We next complain of the error of the court in permitting the sheriff to testify, over the objection of the appellants, that there were safes in Forrest County equipped with gas. (R. p. 99) This was highly prejudicial.

We next complain of the unlawful arrest of the appellants, because the sheriff testified that at the time he began to pursue the vehicle, none of the parties in the vehicle were committing a crime, in his presence, and he had no search warrant for the vehicle, and he had no knowledge that whiskey was being transported therein. (R. p. 107)

We next complain of the error of the court in overruling the motion of the appellants to exclude the testimony of the sheriff, who testified that he arrested these two appellants after the vehicle was stopped and had placed them in a common jail, and forty-five minutes later went to the car and searched the same and obtained the articles testified to.

The court further committed error in not permitting the highway patrolman, Puckett, on cross-examination, to respond to the question of counsel for the appellants as to why they were being arrested. Certainly, under the law, they had a right to know for what they were being arrested, and the statute requires them to be informed of the reason for the arrest, but the learned Court sustained the objection to this inquiry. (R. p. 129)

We complained of the error of the court in overruling the motion of the appellants to exclude the items found on the highway because they had not been identified as having come from the vehicle in which the appellants were occupants. (R. p. 131) It will be further noted that the prosecution undertook to introduce a pair of gloves found on the highway by highway patrolman Puckett, and on cross-examination he was asked,

"Q. Could you tell the court whether those gloves came out of that car?"

"A. No, sir.

"Q. You could not, could you?

"A. No, sir.

"Q. And with reference to the cap that was found on the highway, you couldn't tell the gentlemen of the jury that the cap came out of that car, could you?

"A. No, sir. I couldn't swear to it." (R. pp. 126-127)

We cite the case of *Jack Newton v. The State*, 98 So. (2d) 116, decided November 18, 1957, wherein the defendant was convicted of possession of burglary tools, articles and instruments, the Supreme Court, Chief Justice McGehee, held that there was no evidence on which the case could have been submitted to jury, except upon instruction directing verdict in defendant's favor.

The court further stated that:

> "In prosecution for possession of burglary tools, articles and instruments found in trunk of automobile which was owned by another and in which defendant was riding at time of his arrest, evidence showed that owner had had complete control and possession of automobile, and that contents therein belonged to him, and did not sustain conviction."

In this case there was a reversal and the appellant discharged.

We also cite the case of *Berry Smith, Jr. v. State*, 128 So. (2d) 857.

It is earnestly submitted that because of the many errors committed by the lower trial court, the rights of the appellants were highly prejudiced and they were denied their constitutional right to a fair and impartial trial, and that this court should be its solemn opinion

reverse the judgment of conviction and discharge the appellants.

Respectfully submitted,
/s/ Earle L. Wingo
Attorney for Appellants

CERTIFICATE

I, Earle L. Wingo, attorney for appellants, hereby certify that the original of the above brief of appellants was this date mailed, postage prepaid, to Honorable Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, at his office in Jackson, Mississippi, and that a copy was mailed, postage prepaid, to Honorable Joe T. Patterson, Attorney General, at his office in Jackson, Mississippi.

Witness my signature this the 16 day of November, A.D., 1961.

/s/ Earle L. Wingo
Attorney

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SEPTEMBER, 1961 TERM

No. 4948

WILLIAM L. HEAD and
J. M. CUMMINGS — Appellants

vs.

STATE OF MISSISSIPPI — Appellee

BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Appellants were jointly indicted with Berry Smith, Jr. for possession of burglary tools. After severance granted, Smith was separately tried, convicted and sentenced to the Penitentiary. Smith appealed his conviction and in *Smith v. State*, 128 So. 2d 857 his conviction was reversed and he was discharged here. Appellants were then tried together, convicted and sentenced to serve terms of five years in the State Penitentiary, from which conviction and judgment they appeal.

STATEMENT OF FACTS

The facts in this case are, of course, identical with those in Smith v. State, supra, except as those facts apply to the different situation that these appellants find themselves in.

About eight-thirty or nine o'clock at night near the airport gate southeast of the City of Hattiesburg, Sheriff Bob Waller was patroling in an unmarked car at about

ten or fifteen miles an hour when he met a Chevrolet Impala traveling at a very slow rate of speed in the opposite direction. The Sheriff passed the Chevrolet, turned around and came up behind it. The driver of the Chevrolet motioned the Sheriff to come up beside his car. The Sheriff pulled up beside the stopped Chevrolet and rolled his window down. When the driver of the Chevrolet saw that it was the Sheriff he drove away rapidly. As the Sheriff described it in the case at bar the car occupied by appellants "scratched" out and at the Smith trial, "took off in a cloud of smoke." The Sheriff sounded his siren and immediately pursued the Chevrolet. Within ten seconds the Chevrolet was exceeding the speed limit. The Sheriff followed the Chevrolet through traffic onto the Highway 49 Bypass, with which this court is certainly familiar, passed stop signs at an unlawful rate of speed, committed several extremely dangerous maneuvers in weaving and speeding through traffic, ultimately reaching speeds in excess of 110 miles per hour. The Sheriff radioed for help and Patrolman Puckett happened to be in the vicinity and joined the chase. After the lengthy chase up the Highway 49 Bypass, the Chevrolet driver obviously realized he could not outrun the pursuing vehicles and pulled over on the side of the road. The Sheriff pulled up in front of the Chevrolet and the Patrolman pulled up in the rear. The Patrolman arrested the driver, Berry Smith, Jr., and the Sheriff arrested the other two occupants.

The record in this case discloses that during this chase up Highway 49 Bypass, several articles were thrown out of the windows on the right hand side of the Chevrolet. One of these appellants was sitting in the front seat on the righthand side and the other appellant was sitting in the rear. Subsequent search along the road

shoulder resulted in the finding of gloves and a cap, while a short while thereafter a college student who was on the road attempting to hitchhike a ride to Jackson found a pistol which obviously had been in the grass only a short while and which was a perfect fit in a holster which was found in the Smith car when searched. In addition to this holster, which was a shoulder holster, other gloves, a .45 calibre revolver (loaded) and an assortment of tools, established to be burglars' tools, and other paraphenalia were found. The most interesting item was a gas mask and it was shown by the Sheriff that there were several safes in the Hattiesburg vicinity which were equipped to eject a disabling gas when the safe was tampered with. Additionally, in the trunk of the car were found three suitcases containing clothes, money wrappers, money, and other articles.

Neither of appellants testified nor did they offer any witnesses in their behalf.

ARGUMENT

POINT I

THE COURT DID NOT ERR IN GRANTING TO THE STATE INSTRUCTION NO. 1 (R. 24).

This point is not well taken for two reasons. First, even though there may not have been any evidence with respect to the finding of any of the tools or implements concealed about the person or luggage of the appellants, rather than prejudice the appellants, this instruction would have put an additional burden on the State. Furthermore, unquestionably the jury was warranted in inferring from the evidence that one or both of these appellants had at least one of the items of evidence on his person at least during a part of the wild chase.

Otherwise, why would appellants have thrown the articles out of the car window to the side of the road.

Secondly, practically every judicial definition of the word "baggage" which this writer has been able to find justify this instruction on the ground the "baggage" is not merely the suitcase or other container commonly used by travelers in carrying their belongings, but the word refers to the belongings themselves. The term "baggage" has been held to include tools used in a trade and usually carried about by the owner from place to place in his trunk; razors and other tools of a barber, carpenters tools carried in a trunk with the owners clothing, and in one case the term was held to include a "rifle, revolver, two gold chains, two gold rings, and silver pencil case" belonging to a fashionable gentleman traveling for pleasure and amusement. The court is referred to the scores of judicial definitions of this term beginning at *Page* 19 *of Words and Phrases, Permanent Edition, Volume* 5.

POINT II

THE LOWER COURT DID NOT ERR IN OVERRULING THE OBJECTION OF THE APPELLANTS TO THE TESTIMONY OF SHERIFF WALLER ON THE GROUND THAT APPELLANTS HAD VIOLATED NO LAW IN THE PRESENCE OF THE SHERIFF.

This Honorable Court will note that, while the testimony shows that Patrolman Puckett arrested the driver of the car, Berry Smith, the Sheriff himself arrested the two appellants. Nowhere in this record is it shown on what charge the Sheriff arrested these two men. Counsel for appellant asked the Sheriff "Why" you arrested these two men and the Sheriff gave as his reason that

they had participated in this wild ride, but in spite of the vigorous cross-examination, appellants' counsel did not ask what charge was made. Therefore, the record is silent as to what these men were charged with and it must be presumed that they were charged with some crime committed in the Sheriff's presence. The testimony clearly shows that several articles were hurled out of the windows on the right hand side of the car and onto the highway or the right-of-way. This is a violation of Section 2214.5 of the Mississippi Code of 1942, Recompiled, or if the articles which the officers saw thrown out on the highway should not be held classified so as to fall within the condemnation of this statute, the Sheriff was certainly warranted in thinking so.

At any rate, this record is silent and it must be assumed by this court that something in the conduct of these appellants entitled the Sheriff to make the arrest. When the Smith car was halted, they could have used abusive language authorizing arrest, among other things.

POINT III

THE LOWER COURT DID NOT ERR IN OVERRULING THE OBJECTION OF THE APPELLANTS TO THE TESTIMONY OF THE SHERIFF WITH REFERENCE TO ITEMS TAKEN FROM THE AUTOMOBILE IN WHICH THE APPELLANTS WERE PASSENGERS.

Hereunder, appellant relies on *Smith v. State*, supra, the companion suit to this case. However, the law of that case is not applicable here. Berry Smith, Jr. was the driver of the car and this court must have presumed in the Smith case that he was either the owner or in rightful possession thereof. Neither of the present appel-

lants can make the same objection. One of these appellants was in the front seat on the right side and the other of these appellants was in the back seat. Thus, we have the identical situation as confronted this court in *Rose v. State*, 76 So. 2d 835, 222 Miss. 699, from which the following quotation should be sufficient:

> "On the night after the robbery officers stopped an automobile which was being driven by Ballow and in which Wood, Scott and Rose were also riding. In the car the officers found pistols and a rope which the evidence shows was used in the robbery. Proof was made of that on the trial of this appellant. Rose says it was error to make that proof because the officer had no warrant to search the car. The contention is not well taken. In addition to the fact that the automobile was exceeding the speed limit, in the presence of the officers, it is shown that Rose did not own, or claim to own, the automobile, nor did he claim to be in possession thereof, rightfully or otherwise. The car was being driven by Ballow, and Rose was on the back seat. It was licensed in the name of a Mrs. Stevens. To be in position to complain of an illegal search one must be either the owner or in the rightful possession of the property searched."

Thus, has this court precluded this question against these appellants.

POINT IV

THE LOWER COURT DID NOT ERR WITH RESPECT TO THE ADMISSION IN EVIDENCE OF A PAIR OF GLOVES AND A MANS CAP FOUND ON THE HIGHWAY.

The record (182) shows that at the conclusion of the evidence in this case the trial judge, on motion of appel-

lant counsel, excluded from consideration by the jury the gloves and the cap. Therefore, appellants cannot complain.

It is the position of the State that the trial court did err, but erred in excluding the gloves and the cap. The testimony in a case of this kind should be full and complete. In the absence of a confession, the State can only prove possession of burglars tools by circumstances. The court will note the attire of these parties at the time apprehended. They were clad in dark clothing and soft soled shoes and it is important to note that everything they had was calculated to make them hard to see in dark or semi-dark conditions. The use of gloves to avoid leaving fingerprints was explained by the prosecution witnesses. Great latitude is allowed in the reception of circumstantial evidence. *Underhill's Criminal Evidence, 5th Edition, Herrick, Section* 18. There can be no question but that certain articles were thrown from the right hand window or winglows of the Smith car. The record shows that a search was made along the highway with the result that the gloves, the cap and later the pistol were found. Of course, no one could say positively that these were the same articles hurled from the car, but with the wide latitude allowed the trial court, it would be within his discretion to permit the admission in evidence of these articles. The only argument could be the remoteness of the finding of the articles but this is another question left to the discretion of the trial judge and his decision thereon is not to be reversed in the absence of clear proof of an abuse of that discretion and in all circumstances the interval of time between the commsision of an offense and the event to which the offered evidence relates is a factor for the jury to consider in determining

the weight or probative value of the evidence. *Wharton's Criminal Evidence, 12th Edition, Anderson, Section* 149.

Further as to the admissibility of the articles found along the highway, see *Underhill's Criminal Evidence, 5th Edition, Herrick, Section* 116; *Section* 633, *Note* 80; *Section* 872.

POINT V

THE COURT DID NOT ERR IN PERMITTING THE SHERIFF TO TESTIFY WITH RESPECT TO GAS EQUIPPED SAFES IN FORREST COUNTY.

Appellants cite no authority in connection with this contention. It is submitted that in a case of this kind where tools, appliances, and equipment must be established by the State as being, not those of a legitimate carpenter, plumber, electrician, etc., but must show that they are peculiarly adapted to burglary, it was not only competent, but it was necessary, to explain to the court and to the jury the unique use of a gas mask as a device adapted to burglary. Thus, the court very properly allowed the Sheriff to testify that there were safes in the vicinity, and particularly in the vicinity of the point of contact of the Sheriff with appellants, which were equipped with a type of disabling gas which would be discharged when a safe was tampered with. This is cogent evidence that a gas mask is a burglars device, at least in the Hattiesburg and Forrest County area.

POINT VI

AS TO THE LEGALITY OF THE ARREST BY THE SHERIFF.

Hereunder the argument is repeated that the Sheriff had no right to arrest the appellants because at the time

he began to pursue the vehicle none of the parties in the vehicle were committing a crime in his presence. There is nothing in this record to indicate that anyone other than the driver of the car, Berry Smith, Jr., was arrested for and charged with anything in connection with the speeding or reckless operation of the vehicle.

POINT VII

THE LOWER COURT DID NOT ERR IN OVERRULING APPELLANTS MOTION TO EXCLUDE THE TESTIMONY OF THE SHERIFF WITH RESPECT TO THE ARTICLES TESTIFIED TO.

As pointed out hereinabove, under Rose v. State, the appellants cannot complain of the search of an automobile not belonging to them nor under their control.

POINT VIII

THE LOWER COURT DID NOT ERR IN NOT PERMITTING PATROLMAN PUCKETT, ON CROSS-EXAMINATION, TO STATE WHY THE APPELLANTS WERE BEING ARRESTED.

The record shows that Patrolman Puckett arrested Berry Smith, Jr. and that Sheriff Waller arrested the appellants. The trial court very properly put a halt to the interrogation of Patrolman Puckett as to the charge under which Sheriff Waller arrested appellants since it is obvious from the record (R. 128-129) that Patrolman Puckett did not know the charge and his testimony with respect thereto was hearsay.

POINT IX

THE LOWER COURT DID NOT ERR IN OVERRULING THE MOTION OF APPELLANTS TO EXCLUDE THE ITEMS FOUND ON THE HIGHWAY.

As pointed out hereinabove, the lower court did exclude the gloves and cap, but did not exclude the pistol. The court properly allowed the pistol to be introduced in evidence since it was demonstrated that it fit the shoulder holster found in the car and the circumstance of it being found by the college student along the route where the officers had seen articles being thrown out of the car is sufficient to make it competent, relevant and material.

The fact that it could not possibly have been positively identified as belonging to one of appellants and the fact that it was found a short while after the incident can only go to the weight to be attached to this evidence by the jury. Further, as argued hereinabove, the prosecution was prejudiced when the trial judge excluded the gloves and cap erroneously.

CONCLUSION

In conclusion the appellants cite *Newton v. State*, 98 So. 2d 116, 232 Miss. 114. This case is clearly distinguishable from the case at bar. In the case at bar there was no evidence offered in defense. The hurling of objects out of the right hand windows of the car clearly indicates that someone other than Berry Smith, Jr., the driver, was exercising control over objects within the car. In the Newton case, Newton testified in his own defense and was his only witness. He told a story that exonerated him and which could not be overcome by the State. Under the rule of *Weathersby v. State*, 165 Miss. 207, 147 So. 481, 482, it was held that he must be discharged. In the case at bar we have no explanation from the appellants or anyone else to refute the strong case made out by the State.

Wherefore, it is respectfully submitted that there was ample evidence to justify the verdict of the jury and that

verdict and the judgment of the trial court should not be disturbed.

Respectfully submitted,

JOE T. PATTERSON, Attorney General

By

Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief of Appellee, State of Mississippi, to Honorable Earle L. Wingo, Attorney at Law, Hattiesburg, Mississippi.

This the 7th day of December, 1961.

Assistant Attorney General

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 41,948

WILLIAM L. HEAD and
J. M. CUMMINGS — Appellants

vs.

STATE OF MISSISIPPI — Appellee

SUGGESTION OF ERROR

Comes now the appellants, William L. Head and J. M. Cummings, and respectfully suggests to this Honorable Court that error was committed in the decision of the above styled and numbered cause rendered on January 22, 1962, as follows, to-wit:

I.

That the Court erred in failing to reverse the decision of the lower court for the reason that Sheriff Bob Waller was allowed to introduce certain alleged burglary tools found in the automobile owned by Berry Smith, Jr.

II.

That the Court erred in failing to reverse the lower court for the reason that the alleged burglary tools and articles picked up along the Highway were not identified as articles coming from the automobile in which appellants were passengers.

ARGUMENT

We seriously suggest that this Honorable Court erred in affirming the judgment of the lower court when we

first considered that at most, the proof of the State of Mississippi was that appellants, William L. Head and J. M. Cummings, were passengers in an automobile driven by Berry Smith, Jr., at the time when he was apprehended by the Sheriff of Forrest County, Mississippi, and other officers of the law on a charge of speeding. The record fails to show any evidence to the effect that the driver of the automobile, Berry Smith, Jr., and the two occupants of the automobile were on any joint mission for the purpose of violating the law, nor does the State offer any proof to the effect that the alleged burglary tools belonged to either passenger in the automobile owned by Smith. This Court is well aware of the established rule that articles of personal property are presumed to be owned by the person in whose possession they are found. Berry Smith was the owner of the automobile and the articles found in the car was certainly presumed to be his property.

We respectfully recite the case of Jack Newton vs. State, 98 So. 2d 116, in which said case the defendant was convicted of the possession of burglary tools and the Supreme Court, Chief Justice McGehee, held no evidence on which the case could have been submitted to the jury, except upon instruction directing verdict in defendant's favor. "In prosecution for possession of burglary tools, articles and instruments found in trunk of automobile which was owned by another and in which defendant was riding at time of his arrest, evidence showed that owner had had complete control and possession of automobile, and that contents therein belonged to him, and did not sustain conviction." This case was a reversal and the appellant discharged. There is no proof whatsoever in this record to the effect that either

passenger knew of the presence of the tools in the car. We seriously contend that it was the burden of the State of Mississippi to prove such in this case.

We therefore, respectfully submit and suggest that this Honorable Court erred in affirming the conviction of the lower court.

Respectfully Submitted,
/s/ Lawrence Arrington
Attorney for Appellants

CERTIFICATE

I, Lawrence D. Arrington, Attorney for Appellants hereby certify that the original of the above suggestion of error was on this date mailed, postage prepaid to Honorable Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, at his office in Jackson, Mississippi, and that a copy was mailed, postage prepaid to Honorable Joe T. Patterson, Attorney General, at his office in Jackson, Mississippi.

Witness My Signature, on this the 31st day of January, A. D., 1962.

/s/ Lawrence Arrington
Attorney for Appellants